Supreme Court, U.S.
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NO. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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WESTINGHOUSE ELECTRIC CORPORATION, *et al.*,

Petitioners,

v.

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier, *et al.*,

Respondents.

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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# PETITION FOR WRIT OF CERTIORARI

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239 pp

## QUESTIONS PRESENTED

The 1986 Superfund Amendments and Reauthorization Act ("SARA") amendments to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") include a provision, 42 U.S.C. § 9658, that establishes a federal accrual date for certain actions "brought under State law for personal injury, or property damages." The federal accrual date is defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."

The questions presented are:

1. Whether this federal accrual rule for state law tort claims violates the Commerce Clause and Tenth Amendment of the United States Constitution.

2. Whether under this objective discovery rule, and in the absence of diligent investigation by plaintiffs, accrual may be postponed or tolled as long as there is information questioning causation.

## LIST OF THE PARTIES TO THIS PROCEEDING

**The following parties are Petitioners in this proceeding:**

WESTINGHOUSE ELECTRIC CORPORATION
GENERAL MOTORS CORPORATION
CURTISS-WRIGHT CORPORATION
OCCIDENTAL CHEMICAL CORPORATION
WASTE MANAGEMENT OF NEW YORK, INC.
BROWNING-FERRIS INDUSTRIES, INC.
ALLIED WASTE SYSTEMS, INC., formerly known as Laidlaw Waste Systems, Inc.
LITTON SYSTEMS, INC.
WARNER-LAMBERT COMPANY
FORD MOTOR COMPANY
NIAGARA MOHAWK POWER CORPORATION
NEW YORK STATE ELECTRIC & GAS CORPORATION
DRESSER INDUSTRIES, INC.
AMERICAN STANDARD INC.
CARBORUNDUM COMPANY
TRICO PRODUCTS CORPORATION
E. I. DUPONT DE NEMOURS & COMPANY

Each of the Petitioners was named as a defendant or a third party defendant in the complaints underlying this Petition and was an appellee/cross-appellant in the court of appeals.

**The following parties are Respondents in this proceeding:**

RAYMOND FREIER, individually, as Administrator of the Estate of Rose Freier, deceased, and as surviving spouse of Rose Freier,
ROSE FREIER, his spouse,

ARTHUR L. PHILLIPS, Administrator of the Estate of Leo Phillips, deceased, and Dorothy Phillips, as the surviving spouse of Leo Phillips,
TAB FUQUA,
CHARLOTTE MUCHA, individually, as Executrix of the Estate of Alfred G. Mucha, deceased, and as surviving spouse of Alfred Mucha,
JOHN FARINO, Administrator of the Estates of Mary Jane Farino and Robert Farino, deceased,
GRACE ASTOR, individually, and as surviving spouse of Evo T. Astor, deceased,
HARRY BASINSKI, SR.,
ELLEN BASINSKI, his spouse,
KATHY KAMINSKI, Administratrix of the Estate of Joseph Inzinna, deceased,
MARY YLMAR,
MARIE MANOLIS, Executrix of the Estate of Louis Manolis, deceased, and individually as the surviving spouse of Louis Manolis, legal representative of the Estate of Leo Ott, deceased, and Administratrix of Mary M. Sturm, deceased,
WILLIAM NIELSEN,
BETTY BARABASZ, Executrix of the Estate of George Pagels, deceased,
GLORIA PAGELS, individually as the surviving spouse of George Pagels,
JOSEPH GRANDILLO, Executor of the Estate of Stephen Grandillo, deceased,
SHIRLEY KUCZKA, Executrix of the Estate of Henry Kuczka, deceased, and individually as the surviving spouse of Henry Kuczka,
MARY ANN BOXHORN, Executrix of the Estates of Leo and Annabel Foisset, deceased,
EILEEN FOLTS, Administratrix of the Estate of Helen Hancock, deceased,
FRANKLIN MUELLER,

FLORA MUELLER, his spouse,
ROBERT S. FIELS,
DELORES FIELS, his spouse,
IRENE M. MARINO, legal representative of the Estate of Anthony J. Marino, deceased, individually as the surviving spouse of Anthony J. Marino,
NANCY FORMAN,
CARL P. FORMAN, SR., her spouse,
JOSEPH J. WIEDENBECK, JR., legal representative of the Estate of Isabelle A. Wiedenbeck and Joseph J. Wiedenbeck, Sr., deceased,
LINDA KISTKA, legal representative of the Estate of Nelson M. Hirsch, deceased,
NELLY ANTHONY, legal representative of the Estate of Diane Anthony, deceased,
ELEANOR JASINSKI, legal representative of the Estate of Leocadia Jasinski, deceased,
GEORGE SCHERRER, JR., legal representative of the Estate of George Scherrer, Sr., deceased,
MARIE SCHERRER, individually as the surviving spouse of George Scherrer, Sr., deceased,
VERONICA A. ZAWATSKI, legal representative of the Estate of Robert Zawatski, deceased, and individually as surviving spouse,
MICHAEL LAMANCUSO,
MARLENE LAMANCUSO, his spouse,
THOMAS SZYPLMAN, legal representative of the Estate of Victoria Szyplman, deceased,
GERALDINE DAVIES,
MORLEY P. DAVIES, her spouse,
KEVIN BATT, individually, as Administrator of the Estate of Charles W. Batt, deceased, and Executor of the Estate of Rose E. Batt, deceased,
PATRICIA BATT, his spouse,
DONNA MCKOWAN,
DONALD MCKOWAN, her spouse,

NORMAN WAGNER,
PATRICIA WAGNER, his spouse,
EILEEN EWERT, Administratrix of the Estate of EVO T. ASTOR, deceased,
THOMAS F. HEWNER, Public Administrator of the Estate of Lorraine E. Brzezicki, deceased,
LAWRENCE HEANEY, legal representative of the Estate of Gretchen Heaney, deceased
MARIE MARTZOLF, Executrix of the Estate of Robert Martzolf, deceased, and individually as surviving spouse,
JACQUELINE MONGIOVI, Executrix of the Estate of Vincent Mongiovi, deceased and individually as his surviving spouse.

Each of these Respondents were plaintiffs in separate lawsuits filed in the district court and were appellants and cross-appellees in the court of appeals.

The following parties were named defendants or third-party defendants in the district court, but are not petitioning this Court:

LANCASTER STONE PRODUCTS CORPORATION
BRYAN PFOHL
PAUL M. PFOHL
PFOHL BROTHERS
PFOHL ENTERPRISES
TOWN OF CHEEKTOWAGA
W.S. TYLER, INC.
HOWDEN FAN COMPANY, formerly known as Buffalo Forge Company.

The UNITED STATES OF AMERICA intervened in the court of appeals on the constitutional questions. Notice has been given to the United States of this Petition pursuant to Rule 29.4(b).

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## STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court 29.6, Petitioners provide this Corporate Disclosure Statement for all nongovernmental corporate parties:

American Standard Inc.
American Standard Inc. is wholly owned by American Standard Companies Inc., a holding company.

Browning-Ferris Industries of New York, Inc.
Browning-Ferris Industries of New York, Inc. is a wholly owned subsidiary of Allied Waste Industries, Inc.

The Carborundum Company
The Carborundum Company is now known as Industrial Holdings, Corp. Industrial Holdings, Corp. is wholly owned by its parent company Lehman Brothers Holdings, Inc.

Curtiss-Wright Corporation
Curtiss-Wright Corporation has no parent corporation and no publicly held company owns more than 10% of its stock.

Dresser Industries, Inc.
DII Industries, LLC is a successor to Dresser Industries, Inc., and is a wholly owned subsidiary of Halliburton Company.

E.I. du Pont deNemours & Company
DuPont has no parent corporation and no publicly held company owns 10% or more of its stock.

Ford Motor Company
Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

General Motors Corporation
General Motors Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Howden Fan Company
Howden Fan Company is now known as Howden Buffalo, Inc. Howden Buffalo, Inc. is a wholly owned subsidiary of Anderson Group, Inc.

Laidlaw Waste Systems, Inc.
Laidlaw Waste Systems, Inc. (now known as Allied Waste Systems, Inc.) is wholly owned by Allied Waste North America, Inc.

Lancaster Stone Products Corporation
Lancaster Stone Products, LLC, formerly known as Lancaster Stone Products Corporation, is a privately held entity and no publicly held company owns 10% or more of its stock or membership interest.

Litton Systems, Inc.
Litton Systems, Inc. (incorrectly sued as Litton Industries, Inc.), is a wholly owned subsidiary of Litton Industries, Inc. Litton Industries, Inc. is a wholly owned subsidiary of Northrop Grumman Corporation.

New York State Electric & Gas Corporation
New York State Electric & Gas Corporation is a wholly-owned subsidiary of RGS Energy Group, Inc., which is a wholly-owned subsidiary of Energy East Corporation.

Niagara Mohawk Power Corporation
Niagara Mohawk Power Corporation is a subsidiary of National Grid USA, whose parent is National Grid Group PLC.

Occidental Chemical Corporation
Occidental Chemical Corporation is a wholly owned subsidiary of Occidental Petroleum Corporation.

Trico Products Corporation
Trico Products Corporation is wholly owned by Stant Corporation.

Warner-Lambert Company
Warner-Lambert Company is a wholly owned subsidiary of Pfizer Inc.

Waste Management of New York, Inc.
Waste Management of New York, Inc. is now known as Waste Management of New Jersey, Inc.
Waste Management of New Jersey, Inc. is wholly owned by Waste Management Holdings, Inc.
Waste Management Holdings, Inc. is wholly owned by Waste Management, Inc.

Westinghouse Electric Corporation
Westinghouse Electric Corporation is a wholly owned subsidiary of Viacom Incorporated, successor to CBS Corporation.

W.S. Tyler, Inc.
By Stipulation entered September 12, 1996, this party was dismissed from all actions.

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## STATEMENT PURSUANT TO RULE 29.4(b)

Because the proceedings draw into question the constitutionality of 42 U.S.C. § 9658, contained in an Act of Congress, and neither the United States nor any federal department, office, agency, officer or employee is a party, 28 U.S.C. § 2403(a) may apply.

## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the Second Circuit was entered on August 15, 2002, is reported at 303 F.3d 176 (2d Cir. 2002), and is reprinted in Appendix A to this petition ("Pet. App."). The opinions of the District Court for the Western District of New York, entered October 27, 1998 and September 22, 1999, are reported at 26 F. Supp. 2d 512 (W.D.N.Y. 1998) and 68 F. Supp. 2d 236 (W.D.N.Y. 1999), and are reprinted in Appendices B and C respectively.

## STATEMENT OF JURISDICTION

The Second Circuit decision was entered on August 15, 2002. Petition for rehearing *en banc* was denied on October 8, 2002. See Appendix E. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Notice pursuant to Rule 29.4(b) has been given to the United States Solicitor General.

## CONSTITUTIONAL/STATUTORY PROVISIONS

Commerce Clause: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ." U. S. Const., Art. 1, § 8.

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U. S. Const., Amend. X.

Exception to State statutes: In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any

hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date [defined as "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages ... were caused or contributed to by the hazardous substance or pollutant or contaminant concerned"] in lieu of the date specified in such State statute. 42 U.S.C. § 9658 (a)-(b)(4)(A). The full text of 42 U.S.C. § 9658 is set forth at Appendix F.

## STATEMENT OF THE CASE

From 1930 to 1969, the 120-acre Pfohl Brothers Landfill ("the Landfill" or "the Site") was openly operated just outside Buffalo, New York. Following its closure in 1969, nearby residents and others began to question the potential for health risks associated with the Site. In the 1980s, attention to potential health hazards from the Site increased. The government identified substances at the Site and conducted tests regarding their potential impact on the surrounding area. The Site was listed on the Federal National Priorities List and on New York State's first Registry of Inactive Hazardous Waste Sites and was classified as "a significant threat to the public health or environment - action required." The State fenced the Site and erected large, bright yellow signs warning: "DANGER HAZARDOUS WASTE AREA UNAUTHORIZED PERSONNEL KEEP OUT." The State Departments of Health ("DOH") and Environmental Conservation ("DEC") issued letters, updates and fact sheets regarding the Site, established a toll free information number and community liaisons, a public document repository, visited area residents, and conducted a health survey of residents and businesses. By the end of 1991 there had been

at least 28 public meetings, dozens of mailings and broadcast stories, over 100 newspaper articles, and numerous persons, including experts, had publicly asserted a connection between health risks, including cancers, and the Site.

Plaintiffs allege that they (or their decedents) lived, worked or recreated in the vicinity of the Site and were exposed to unspecified hazardous substances, causing various illnesses. Over half of the plaintiffs were personal representatives of individuals who had died as long ago as 1953. The injuries alleged by the living plaintiffs were diagnosed as early as 1963. It was not until many years later, however, in a series of lawsuits filed between January 10, 1995 and September 8, 1998, that plaintiffs commenced these diversity actions against the alleged owner/operators, generators or transporters of waste to the Site.

Plaintiffs acknowledge that they failed to inquire as to the possible cause of their injuries. Rather, although they had retained attorneys in the Spring of 1994, each and every plaintiff contends that he did not actually "discover" the alleged cause of his (or his decedent's) injuries and thus his claims did not accrue until December 1994 when his attorney and litigation expert advised him his injuries may be causally related to the Landfill. Admitting their claims were time-barred under any interpretation of New York law, plaintiffs asked the trial court to assign December 1994 as the accrual date for their claims. Plaintiffs alleged that this was the date the federal required commencement date statute ("FRCD"), 42 U.S.C. § 9658, would afford them under its "knew or reasonably should have known" standard.

**Decisions Below**

Defendants moved for summary judgment challenging the constitutionality of the FRCD on Commerce Clause and Tenth Amendment grounds and arguing that the FRCD's express language disallowed its application to plaintiffs'

claims. Defendants also argued that plaintiffs' claims were untimely even if the FRCD was applied, because under a "knew or reasonably should have known" standard, given the amount of available information regarding the Landfill and potential for health problems associated with the Site, plaintiffs' claims accrued as a matter of law *at the latest* by the end of 1991.

The district court upheld the FRCD on constitutional grounds and held that, despite its express application to "claims under state law for personal injury or property damage," the FRCD also applied to plaintiffs' wrongful death claims. Thus, the district court denied defendants' motion for dismissal of the wrongful death claims. Pet. App. B at 147a. In addressing accrual of plaintiffs' claims under the FRCD, the district court found, however, that "sufficient information was available prior to 1992" such that plaintiffs reasonably should have discovered "the possible existence of a claim based on their cancers," i.e. they should have discovered information suggesting a causal relationship between exposure and their injuries by the end of 1991 *at the latest*. Pet. App. C at 178a. The court held that under the FRCD rule the plaintiffs' personal injury claims accrued no later than the end of 1991, and, since the plaintiffs did not commence suit until in or after 1995, their claims were time-barred. Pet. App. C at 197a. This holding was then applied to the wrongful death claims, and they, too, were dismissed as untimely. See Amended Final Judgment, Appendix D.

Plaintiffs appealed the dismissal of their claims to the Second Circuit. Defendants cross-appealed challenging the constitutionality of the FRCD and the district court's application of the FRCD to wrongful death and survival claims. The Second Circuit upheld the FRCD on constitutional grounds and affirmed the district court's expansion of the FRCD to wrongful death claims. In interpreting the "knew or reasonably should have known"

accrual rule of the FRCD, the Second Circuit focused on what plaintiffs argued was information questioning a causal connection between the Landfill and their alleged injuries. The circuit court gave weight to plaintiffs' contention that, had they inquired, they would have been lulled into delaying suit by reassurances of non-parties that their injuries may not have been caused by the Landfill. The Second Circuit held that an issue of fact exists as to whether "plaintiffs reasonably should have known prior to the end of 1991 that the Landfill was the cause of the injuries." Pet. App. A at 61a. The decision cited no legal authority other than the FRCD for the standard it applied that permitted plaintiffs to delay accrual beyond the date when information is available to suggest a causal connection between exposure to the Landfill and plaintiffs' injuries, thus putting them on notice of their claims.

## REASONS FOR GRANTING THE WRIT

### I. THE FRCD EXCEEDS CONGRESS' POWER UNDER THE COMMERCE CLAUSE AND VIOLATES THE TENTH AMENDMENT.

The "federally required commencement date" sets a federal accrual date for state tort claims. This act of Congress is unconstitutional for two reasons. Engrafting federal accrual dates onto state law statutes of limitations governing state law claims constitutes regulation of non-economic and local activities, in violation of the Commerce Clause. Further, the imposition of a federal accrual rule for state law tort claims effectively changes state law and erases the line separating state and federal powers, in violation of the Tenth Amendment.

This Court should grant certiorari to halt this expansion of federal powers and invasion of state sovereignty, to correct a misinterpretation of this Court's prior constitutional rulings, and to clarify the limits of Congressional authority.

**A. By Upholding The FRCD Under The Commerce Clause, The Second Circuit Gives Congress Expansive Power In Contravention of *United States v. Lopez* And Its Progeny.**

The Commerce Clause of the United States Constitution protects inherently non-economic and local activity from the reach of Congress' regulatory powers. This Court has reaffirmed the proposition that "the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited" and has declined to expand the Commerce Clause's reach to activities that on their face have no relation to interstate commerce. *See Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001); *United States v. Lopez,* 514 U.S. 549, 551 (1995); *see also Jones v. United States*, 529 U.S. 848 (2000); *United States v. Morrison*, 529 U.S. 598 (2000).

Congress may regulate those activities that *substantially* affect interstate commerce.

> [T]he scope of the interstate commerce power "must be considered in light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."

*Lopez,* 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

Because the setting of accrual dates for state law claims is non-economic, local in nature, and does not "substantially affect" interstate commerce, the FRCD is an impermissible exercise of Congress' Commerce Clause powers.

**1. The FRCD Exceeds Commerce Clause Limits.**

The activity regulated by the FRCD (setting a federal accrual date for select state law personal injury and property damage claims) "has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one may define those terms." *Lopez*, 514 U.S. at 561. When it enacted the FRCD, Congress made no findings regarding any impact the accrual of state law torts claims would have on interstate commerce. A change in accrual rules for state law tort claims has no effect on CERCLA's purpose of remediating the sites of past disposal. The FRCD also lacks any jurisdictional element that limits its reach to a "discrete set of [activities] that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562. Instead, the FRCD applies to a wide range of state law claims, regardless of the parties involved, the amount in controversy, or the source of the alleged hazardous substances underlying the claim.

By definition, the FRCD applies only to *local* claims. 42 U.S.C. § 9658 (a) ("actions under state law for personal injury and property damages"). The activity regulated by the FRCD, accrual of those state law claims, is likewise "local." If it was not for the FRCD, state law would govern the accrual of these state law claims. CERCLA does not provide for private tort liability. For obvious reasons, states have traditionally managed these claims. This Court has cautioned that the federal government should not tread upon such areas. *See, e.g., Lopez*, 514 U.S. at 577 (Kennedy, concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur..."); *Jones*, 529 U.S. at 858; *Solid Waste Agency*, 531 U.S. at 174.

Based on the non-economic and local nature of the activities at issue, this Court has held that the Commerce Clause does not permit federal regulation of guns in a school zone (*Lopez*), civil remedies for victims of domestic violence (*Morrison*), and the protection of migratory birds in intrastate waters (*Solid Waste Agency).* Any purported connection the accrual of state law claims might have to interstate commerce is even more remote than the connections rejected in *Lopez, Morrison,* and *Solid Waste Agency.*

**2. Any Effect CERCLA As A Whole May Have On Interstate Commerce Does Not Justify The FRCD.**

In evaluating whether the FRCD exceeds Congress' Commerce Clause powers, the Second Circuit does not examine the FRCD alone, but rather attempts to bootstrap the commercial effects of CERCLA onto the FRCD. Pet. App. A at 45a ("it is not necessary that each element of the regulatory scheme have a substantial connection with commerce when viewed in isolation"). However, reliance on the larger regulatory scheme to justify a particular aspect fails where, as here, the legislation at issue "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561.

The FRCD is not an essential part of CERCLA. In fact, the FRCD concerns an activity otherwise untouched by CERCLA. Congress did not create a federal toxic tort cause of action in CERCLA or otherwise. *Exxon Corp. v. Hunt*, 475 U.S. 355, 359 (1986). CERCLA was enacted to facilitate the clean up of inactive hazardous waste sites, and the FRCD does not relate to CERCLA's primary focus. *Id.* It applies to tort claims that are not part of any CERCLA litigation and that have no relation to any CERCLA site. Congress commissioned a study in 1980 to examine the adequacy of existing common law and statutory tort

remedies, including "barriers to recovery posed by existing state statutes of limitations." 42 U.S.C. § 9651(e). The study group recommended that the state legislatures amend their state accrual rules to provide a discovery rule for hazardous substance exposure cases. Relevant portions of the study are reproduced at Appendix H. There was no recommendation that Congress enact any law, much less a *federally required* commencement date. Nonetheless, Congress included the FRCD in its SARA amendments to CERCLA in 1986. There is simply no basis for finding that CERCLA is dependent on regulation of accrual of state tort claims.

The Second Circuit suggests that the FRCD may provide incentive to parties to clean up inactive hazardous waste sites, thus furthering the goals of CERCLA. Pet. App. A at 49a-50a. There is no evidence, however, that the FRCD provides such an incentive or that any purported incentive is "essential" to the overall scheme of CERCLA. Using CERCLA as an example, the incentive to clean up CERCLA sites existed prior to the enactment of the FRCD and is based on the coercive powers of sections 106 and 107 of the statute. 42 U.S.C. §§ 9606-07. The notion that a postponement of the accrual date for potential toxic tort cases has an impact on the conduct of potentially responsible parties under CERCLA is hypothetical, as Congress made no such finding.

CERCLA's effect on interstate commerce provides no basis for concluding that the FRCD has the same effect. Federalizing accrual dates for state tort claims interferes with state regulation of local claims which has traditionally been left to the states, and, as such, "plows" new federal ground and represents a "sharp break" with prior law. *Cf. Lopez*, 514 U.S. at 563. The FRCD fails the Commerce Clause test and should be stricken as unconstitutional.

**B. The FRCD Violates The Tenth Amendment By Impermissibly Impinging On State Sovereignty.**

The Tenth Amendment to the United States Constitution provides that those powers not expressly granted to the federal government are reserved to the states. For a statute to be constitutional under the Tenth Amendment, Congress must first have had the authority to regulate the activity pursuant to one of the delegated powers under the Constitution. *New York v. United States,* 505 U.S. 144, 157 (1992). As set forth above, Congress does not have the power to regulate the accrual of state law claims, thus the Constitutional analysis need go no further.

Even if Congress had the power to regulate in this area, however, the method Congress chose for regulation of state tort claims impermissibly invades state sovereignty. *Id.* at 160. In enacting the FRCD, Congress focused on a single aspect of state tort law (accrual) and regulated that aspect in isolation. In so doing, Congress injected itself into the state legislative process and effectively changed state law. This method of regulation is impermissible under the Tenth Amendment. *See id.* (even if Congress has the power to regulate, it must do so in a way that does not otherwise violate the Tenth Amendment).

In *New York*, this Court acknowledged that "the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases." *Id.* at 155. As in *New York*, this case raises a question of "great importance and delicacy," namely whether federal law may, in isolation, regulate accrual dates for claims arising solely under state law. *Id.*

**1. In Establishing A Federal Accrual Rule For State Tort Claims, Congress Has Commandeered State Legislative Process.**

The constitutional significance of the FRCD is best revealed when the FRCD is viewed in context. Each state has established policies and principles governing accrual of the personal injury and property damages claims that arise under state law. These policies and principles represent each "State's judgment on the proper balance between policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson v. Garcia*, 471 U.S. 261, 263 (1985). For example, the New York State Legislature has enacted Civil Practice Law and Rule Section 214-c, which provides accrual rules for latent injury claims. This Court has recognized that "[i]n virtually all statutes of limitations, the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

The sole purpose and effect of the "federally required commencement date" (FRCD) is to federally change state accrual law (and indeed it is entitled "Exception to State statutes"):

> [I]f the applicable limitations period for [an action under state law for personal injury or property damages] (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date *in lieu of the date specified in such State statute*. 42 U.S.C. § 9658(a)(1) (emphasis added).

Here, Congress did not create a federal cause of action, but rather limited the FRCD's application to state law claims. 42 U.S.C. § 9658(a)(1). Nor is the FRCD part of a larger

federal regulatory scheme to regulate tort claims or even accrual of tort claims. No other aspect of CERCLA or SARA regulates or addresses state law tort claims. In fact, personal injury claims are not within the scope of CERCLA liability, nor are personal injury damages recoverable under CERCLA. *See* 42 U.S.C. § 9607(a). The FRCD expressly provides that other aspects of state tort claims, including statutes of limitations, continue to be governed by state law. *See* 42 U.S.C. § 9658(a)(2) ("State law generally applicable"). Without a compelling federal interest and in the absence of a federal cause of action or federal regulatory scheme, Congress inserted itself into the state legislative process and changed state law to conform to federal dictates. In this way, the FRCD violates the Tenth Amendment.

This Court has long held that the Tenth Amendment prohibits the federal government from using state governments to accomplish federal regulatory purposes. In *New York*, this Court confirmed that Congress cannot compel the states to regulate in a particular field or in a particular way. *New York*, 505 U.S. at 161. Thus, federal action that "would 'commandeer' state governments into the service of federal regulatory purposes ... would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.* at 175. Such action "has never been understood to lie within the authority conferred upon Congress by the Constitution." *Id.* at 176.

A federal law directing a state to regulate in a specific way "would be beyond the authority of Congress." *Id.* Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, "it lacks the power directly to compel the States to require or prohibit those acts." *Id.* at 166, citing *FERC v. Mississippi*, 456 U.S. 742, 762-766 (1982), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288-289 (1981), and *Lane County v. Oregon*, 74 U.S. (7 Wall.) at 76 (1868). These

principles were reaffirmed in *Printz v. United States,* 521 U.S. 898, 935 (1997), where this Court held "[i]t matters not whether policy-making is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

The FRCD cannot be reconciled with these principles. If, as established in *New York*, the Tenth Amendment prohibits Congress from forcing a state to change its own law, may Congress change the state law instead? The FRCD represents a back door attempt to accomplish what the Constitution and this Court have expressly forbidden.

By setting a federal accrual date for state law claims, the FRCD appropriates the state legislative process in favor of *federal* regulation of a *state* regulatory scheme. While the means by which the FRCD accomplishes this appropriation are not identical to those employed in *New York*, the end result is the same and similarly violative of the Tenth Amendment. Under the FRCD, states are prevented from giving legal effect to the accrual laws they have enacted and are instead forced to accept Congress' change in state law. Never before has this Court, under the Tenth Amendment, or otherwise, endorsed the idea that federal law can nullify a state's ability to establish accrual rules for its own claims. Just like the statute at issue in *New York*, under the FRCD, states have no choice but to regulate in accordance with the federal mandate. Any state regulation conflicting with the federal mandate is rendered null and void by the FRCD.

The method employed by Congress in enacting the FRCD represents a sharp break with established methods for creating and enforcing federal rights. Congress enacted an accrual rule for state tort claims in the absence of a federal cause of action, and without a compelling federal interest or federal regulatory scheme intended to occupy the field.

CERCLA was not enacted to compensate private parties for harm resulting from discharges of hazardous substances. *See Exxon*, 475 U.S. at 359 (CERCLA "seeks to facilitate government cleanup").

Relying on the Supremacy Clause, the Second Circuit rejects the Tenth Amendment challenge, countering that the FRCD "requires no action by a state's legislative or executive officials, but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim . . ." Pet. App. A at 51a-52a. This reliance, however, is misplaced. A valid federal law, enacted pursuant to Congress' enumerated powers, will pre-empt contrary state law. When that federal law lacks a constitutional foundation and violates the sovereignty of state law, however, the Supremacy Clause cannot save it. Thus, any suggestion that the FRCD is a valid exercise of pre-emption misses the mark. The Supreme Court succinctly rejected this same Supremacy Clause argument in *Printz*, 521 U.S. at 924-25:

> The Supremacy Clause ... makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]" Art. VI, cl. 2, so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

Moreover, the FRCD is *not*, as the Second Circuit posits, an instruction to a state *court* to apply federal law, but a usurpation of the state *legislative* process by changing state law. As previously noted by the Second Circuit, since the FRCD appears to (and purports to) "change state law" it is of "questionable constitutionality." *ABB Indus. Sys. v. Prime Tech.*, 120 F.3d 351, 360 n.5 (2d Cir. 1997).

In enacting the FRCD, Congress manifested no intent to exclusively occupy the field of accrual of state tort claims,

and the FRCD does not do so. Congress established this federally required accrual rule in the absence of a comprehensive federal regulatory scheme. The FRCD constitutes random federal interference on an unsystematic basis, and, as such, violates the Tenth Amendment.

**2. Application Of The FRCD To Wrongful Death Claims Raises Additional Tenth Amendment Concerns.**

The Second Circuit materially alters the definition of a personal injury action under state law by declaring that the FRCD's limited application to "personal injury" claims may include wrongful death claims. Pet. App. A at 38a ("[I]n light of the statutory scheme as a whole, [the FRCD] was meant to encompass" wrongful death claims).[1] There is no legislative history or other suggestion that Congress intended this result. Applying the FRCD to wrongful death claims further abrogates the Tenth Amendment.

A personal injury claim is separate and distinct from a claim for wrongful death and each has its own statute of limitation and accrual rules. In virtually every state, including New York where these claims arose, wrongful death claims are creatures of statute, unrecognized at common law. *See The Harrisburg*, 119 U.S. 199, 214 (1886); see also chart of state wrongful death statutes, Appendix G. Indeed, federal law recognizes the fundamental distinction between wrongful death and personal injury claims. *See, e.g., Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 578 (1974) ("[A] single tortious act might result in *two*

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[1] If Congress "meant" the FRCD to include wrongful death actions it would have done so separately from personal injury claims as it did in the Federal Tort Claims Act, 28 U.S.C. § 2672; the Federal Employers Liability Act, 45 U.S.C. § 51; and Jones Act, 46 U.S.C. § 688.

*distinct*, though related harms, giving rise to *two separate causes of action*...[a wrongful death action is] independent of any action the decedent may have had for his own personal injuries.") (emphasis added).

In most states, including New York, a wrongful death claim accrues on the date of death, without exception. *See, e.g.*, NY EPTL § 5-4.1. Typically, the discovery rule does not apply to such claims. *See* Joseph M. McLaughlin, *Practice Commentaries to CPLR 214-c* at 638 (McKinney's 1990); *New York Civil Practice - Estates, Powers and Trusts Law* ¶ 5-4.1[13] at 5-486 (Matthew Bender 1996). Under the rule established by the Second Circuit, a wrongful death claim may not accrue until decades after death when a personal representative "discovers" the cause of the decedent's injury.[2] In this way, the Second Circuit's decision further substantially changes state law.

The Second Circuit disregards the balance that states have struck in enacting wrongful death statutes. Such federal interference with state statutory schemes has never been sanctioned by this Court.

### C. Certiorari Is Warranted To Address The Federalism Concerns Raised By The FRCD.

The FRCD "forecloses the States from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise[.]" *Lopez*, 514 U.S. at 583 (Kennedy, concurring). The Constitution requires a distinction between what is truly national and what is truly

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[2] For example, Eleanor Jasinski brought a wrongful death claim on behalf of the estate of Leocadia Jasinski, who died in 1953. Under New York's wrongful death statute the time to bring this claim expired in 1955. Plaintiff, however, did not commence suit until 1997, some 42 years later.

local. *See id.* at 567. The Court should reject this change in state law and injection of a federal standard of accrual (indeed a "federally required commencement date") into state tort claims, thus evading the boundaries between state and federal authority and effectively changing state law. *See Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

## II. THE COURT SHOULD HALT THE EXPANSION OF THE WELL-ESTABLISHED DISCOVERY RULE OF ACCRUAL.

In reinstating plaintiffs' decades-old claims, the Second Circuit expands the well-established discovery rule of accrual and ignores the proper balancing of interests reflected in accrual of state tort claims. The Second Circuit would allow accrual to be indefinitely delayed based on a standard that rewards meritless cases and that can never be met absent proof of causation-in-fact. Even if knowledge of a cause of action would otherwise be imputed to a plaintiff (i.e. even if a reasonably diligent inquiry would lead a plaintiff to information suggesting injury and causation), the court would delay accrual until such time as counsel and a purported expert urge plaintiff to commence a lawsuit. Even where a plaintiff admittedly fails to inquire about a possible causal connection between claimed exposure and known injury, the Second Circuit would delay accrual if plaintiff points to conflicting opinions as to causation (opinions he was never aware existed at the time he claims they extended accrual).

Relieving a plaintiff of his duty to inquire and then permitting him to delay accrual based on what he believes inquiry might have revealed rewards the dilatory and makes plaintiff the sole arbiter of accrual. This expansion of the "knew or reasonably should have known" discovery rule is wholly unwarranted and should be halted.

**A. The FRCD Does Not Permit Tolling Or Extension Of Accrual Until Such Time As A Plaintiff's Claim Is No Longer The Subject Of Controversy.**

Under a discovery rule of accrual such as the FRCD, a claim accrues when a plaintiff knows, or with reasonable diligence should have known, of a potential causal connection between his injury and its alleged source. 42 U.S.C. § 9658; *United States v. Kubrick*, 444 U.S. 111, 117 (1979). This rule is an objective one and is not to be subjectively applied. *Urie v. Thompson*, 337 U.S. 163, 170-71 (1949); *Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir. 2000) (citations omitted); *Nemmers v. United States*, 795 F.2d 628, 631 (7th Cir. 1986) (employing objective standard to evaluate question of when diligent plaintiff would have discovered cause).

Discovery rules of accrual are intended to balance the notion of repose with the interests of plaintiffs in having an adequate amount of time to discover potential claims. Repose statutes are designed to apportion the consequences of the passage of time between plaintiffs and defendants and to preclude litigation of stale claims. *Kubrick*, 444 U.S. at 117; *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (rejecting expansive discovery rule for RICO cases because it would allow "litigation ... at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities").

Accrual marks the beginning of the period for plaintiff to commence his lawsuit. Plaintiff then has the entire statutory period to determine whether to commence suit, and more time following commencement of his action to discover and develop his proof for trial. Accrual is simply the first step in this ongoing process. It is incumbent on plaintiff to

determine if there is a legal basis for suit, and he must file suit within the limitations period.

Accrual rules for tort claims have evolved to reflect the changing nature of such claims. Initially accrual was marked by the accident date (or in the case of toxic cases, exposure date). Then, as latent injury claims evolved, accrual rules in many states were modified to provide that claims would not accrue until a party "discovers" he was injured by an alleged exposure. Today, some states (and now the FRCD) set accrual as the date a party can fairly be charged with knowledge of his injury and a potential causal relationship between that injury and an exposure.

Since a "discovery" rule necessarily extends accrual, it interferes with repose. Thus, since its inception, courts have staunchly restricted the application of the discovery rule to "blameless ignorance." *Urie*, 337 U.S. at 170; *Kubrick*, 444 U.S. at 121; *Barrett v. United States*, 689 F.2d 324, 327 (2d Cir. 1982), *cert. denied,* 462 U.S. 324 (1982). For purposes of the accrual analysis, a plaintiff will be charged, as a matter of law, with knowledge of all facts he reasonably could have discovered by making a diligent investigation. *Id.* A plaintiff, "armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims. . ." *Kubrick*, 444 U.S. at 123. This is particularly true in this case where there was no evidence submitted by plaintiffs that they "could not have" discovered a causal connection due to lack of medical or scientific information. In fact, plaintiffs' expert offered his opinion based solely on science and facts that were otherwise known and available no later than 1991.

Moreover, given that the discovery rule may extend accrual beyond exposure and discovery of injury, *exceptions* to the rule are *extremely limited*. In the absence of fraudulent concealment by defendant, plaintiffs are not permitted to rely on subjective reasons to excuse their failure to assert their claims in a timely fashion. *See Rotella*, 528 U.S. at 561 ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule"); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192-93 (1997) (noting distinctions between different equitable devices); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991) (same). Absent a legal justification for tolling the statute of limitations (or otherwise estopping defendants from relying on these limitations), there is no basis to postpone accrual. *See id.* To hold that plaintiffs may raise a genuine issue of material fact as to accrual based on conflicting evidence as to causation, results in the exception becoming the rule and results in an issue of fact for every statute of limitations determination.

Thus, in *Kubrick* this Court held that accrual of a medical malpractice claim under the Federal Tort Claims Act is not delayed until such time as plaintiff "discovers" a violation of his legal rights. 444 U.S. at 358-59. The *Kubrick* Court explicitly rejected the plaintiff's subjective excuses that would have extended accrual until discovery that his medical treatment constituted negligence. *Id.* at 124, 127-28. In particular, *Kubrick* rejected plaintiff's excuses that (i) "experts" were divided on the crucial issues of negligence; (ii) the issues were of "technical complexity"; (iii) plaintiff relied on assurances by the Veteran's Administration that he had not been wronged; and (iv) plaintiff received bad advice from his doctor. *Id.* *Kubrick* stressed that "determining negligence ... is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony." *Id.* at

124 (citations omitted). This, however, is no basis for extending accrual. *See id.* at 124, 127-28.

The reasons for rejecting these excuses have equal application whether such excuses (i.e., bad advice, more than one potential cause, conflicting experts, or technical complexity) are offered to explain a plaintiff's failure to "discover" a cause of action in negligence (duty, breach of duty, causation) or failure to discover a potential cause of the injury under the FRCD discovery rule. Such excuses have no place in the evaluation of accrual.

The objective discovery rule may be harsh and may bar otherwise valid claims, yet the plaintiff is obligated to enforce his rights within the limitations period. *Kubrick*, 444 U.S. at 124-25; *see also Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738, 747 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) ("We are not unmindful that a strict adherence to the requirements of the statute of limitations provision ... often works a substantial hardship on plaintiffs and may have a harsh impact on a party innocent of any impropriety. Statutes of limitations often make it impossible to enforce what are otherwise valid claims. Although we recognize the hardship resulting to the plaintiffs in this case, we have no choice but to apply the law as written"); *accord Barren v. United States*, 839 F.2d 987, 992 (3rd Cir. 1988), *cert. denied*, 488 U.S. 827 (1988).

### B. Certiorari Should Be Granted To Resolve The Conflict Among The Circuits As To Whether "Subjective Factors" May Extend Accrual.

While the discovery rule is well-established, courts have not been uniform in their application of the rule. Despite the guidance provided in 1979 by this Court in *Kubrick* and despite the well-established policies underlying accrual and repose statutes, circuit courts are divided on whether excuses

or other subjective factors may delay accrual in a discovery rule analysis.

Many courts determining accrual under a discovery rule have rejected excuses or subjective factors when offered by plaintiffs to extend or delay accrual. For example, in *Gonzalez v. United States*, 284 F.3d 281, 287 (1st Cir. 2002), the First Circuit held that a claim accrues under the "knew or reasonably should have known" standard when plaintiff has notice of *likely cause*, actual or imputed. *Gonzalez* rejected the argument that plaintiff's claims did not accrue until she obtained an expert report. *Id.* at 290-91; *see also Fidler v. Eastman Kodak Co.*, 714 F.2d 192, 199 (1st Cir. 1983) (When a plaintiff is "on notice" of a potential claim, "his cause of action is no longer inherently unknowable" – rejecting argument that action did not accrue until plaintiff found attorney and doctor who would agree with her assessment of her case). "[O]nce the plaintiff is on notice of the injury and its potential cause, the limitations period begins to run, regardless of whether she makes inquiries and continues to run even if she has been incorrectly advised." *Gonzalez*, 284 F.3d at 290 n.10 (citing *Kubrick*, 444 U.S. at 124).

In *Moore v. CSX Transportation, Inc.*, 1992 U.S. App. LEXIS 6490, *6 (4th Cir. 1992), the Fourth Circuit deemed "without merit" plaintiff's contention that he "could not possibly know the origin of his hearing loss until such cause could be properly determined by expert medical opinion." *See also Lampert v. Norfolk & Western*, 1992 U.S. App. LEXIS 13516, *3-4 (4th Cir. 1992) (rejecting plaintiff's reliance on subjective factors or excuses to delay accrual).

The Sixth Circuit in *Wells v. Norfolk Southern*, 1997 U.S. App. LEXIS 4347, *8-9 (6th Cir. 1997), rejected plaintiff's arguments that he should not be held to the discovery rule because he was an uneducated worker and merely thought his

hearing loss was related to getting older and his employer misled him about the cause of his loss. *See also Hughes,* 215 F.3d at 548 (plaintiff may be charged with constructive knowledge even where she is unaware of pervasive media attention; the relevant inquiry "is an objective one").

The Seventh Circuit firmly rejects the idea that when a plaintiff suspects several causes, accrual is delayed until the governing, or even most probable, cause is known. *See Fries v. Chicago & Northwestern Transp. Co.,* 909 F.2d 1092, 1095-96 (7th Cir. 1990) ("The Court held in *Kubrick* that a plaintiff must act diligently...upon experiencing symptoms a plaintiff has a duty to investigate both the injury and any suspect cause"); *see also Tolston v. AMTRAK,* 102 F.3d 863, 865-66 (7th Cir. 1996) (claim accrues even if it is difficult to differentiate among various potential causes); *Nemmers,* 795 F.2d at 632 ("*Kubrick* said that the statute runs even if the plaintiff, because of bad advice, is dissuaded from filing suit.").

The Tenth Circuit has reaffirmed the relevance of *Kubrick* in *Plaza Speedway, Inc. v. United States,* 311 F.3d 1262 (10th Cir. 2002). In reversing judgment for plaintiffs in a toxic exposure case, the court held that plaintiffs' claim accrued when they were notified of the presence of contaminants in their well at which time "they had reason to suspect the source might have been the neighboring property." There was no basis for plaintiffs' claim that accrual under a discovery rule must be determined by the trier of fact or that accrual should be delayed until somebody advised them of a "definite" as opposed to a "possible" cause. *Id. See also Arvayo v. United States,* 766 F.2d 1416, 1422-23 (10th Cir. 1985) (criticizing the district court for applying a subjective standard for accrual and for imposing a duty to disclose on doctors rather than a duty to inquire on plaintiffs; plaintiffs' claim, filed after they fortuitously learned from their attorney of a causal connection between the delay in diagnosis and

brain damage, was untimely because it was brought outside the Federal Tort Claims Act's two year statute of limitations).

Other circuits, however, including the Fifth, Eighth, Ninth, and Eleventh, have adopted an expansive view of the discovery rule and permit reliance on subjective factors to extend accrual.

In *Dubose v. Kansas City Southern Railway Co.*, 729 F.2d 1026, 1031 (5th Cir.), *cert. denied,* 469 U.S. 854 (1984), the Fifth Circuit delayed accrual based on "factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicion regarding what caused his injury."

The Eighth Circuit in *Brazzell v. United States*, 788 F.2d 1352, 1356 (8th Cir. 1986), found that the district court "was correct in disregarding appellee's suspicions about the cause of her injuries" due to reliance on incorrect medical advice. *See also Osborn v. United States*, 918 F.2d 724, 733 (8th Cir. 1990) (as in *Brazzell*, holding that plaintiff was excused due to alleged reliance on the bad advice of her doctors).

In *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002), reviewing the application of the FRCD, the Ninth Circuit considered factors such as plaintiffs' doctors' failure to advise of possible causal link and other conflicting evidence on cause. In replacing California's accrual rule, the *O'Connor* Court looked to "actual knowledge" of cause and factors that questioned causation. *See also Rosales v. United States*, 824 F.2d 799, 804 (9th Cir. 1987) (accrual of claim delayed where plaintiff relied on assurances by doctors that complications were normal).

In *Chamness v. United States*, 835 F.2d 1350 (11th Cir. 1988), the Eleventh Circuit held that accrual of plaintiff's claim was delayed where plaintiff claimed she relied on incorrect medical advice.

The Second Circuit in essence aligns with these circuits in expanding the discovery rule and eroding objective accrual criteria. Without providing any legal justification for doing so,[3] the Second Circuit gives plaintiffs the benefit of many of the excuses rejected by the First, Fourth, Sixth, Seventh and Tenth Circuits. Specifically, the Second Circuit extends accrual based on (a) the dispute among "experts" as to the cause of the plaintiffs' claimed injuries (Pet. App. A at 58a-59a), (b) incorrect or competing medical advice from government officials (Pet. App. A at 59a-61a), (c) plaintiffs' assertion that they lacked definitive and conclusive proof that the defendants' conduct caused their injuries (Pet. App. A at 53a-62a), and (d) the hypothetical cost of seeking advice from the medical or scientific community (Pet. App. A at 56a, holding that the "'reasonably should have known' [standard] [does not] extend to information that was obtainable only through the private commissioning of expensive studies").[4]

The Second Circuit tolls accrual based on alleged omissions by *non-parties*. "We cannot endorse the proposition that, as a matter of law, when reports issued by the responsible public officials stated that there was no provable link between the cancers and the Landfill, members of the public reasonably should have known to the contrary." Pet. App. A at 62a. The opinions of public officials has not changed, yet plaintiffs had enough notice of their potential cause of action to commence suit in 1995.

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[3] The Second Circuit's ten page accrual analysis is devoid of legal citation other than to the summary judgment standard and the FRCD itself. See Pet. App. A at 52a-62a.

[4] The Second Circuit excuses plaintiffs from accrual in 1991 absent a $2 million dollar epidemiology study, even though plaintiffs commenced suit in 1995 without any new information (much less a multi-million dollar study).

The notion that accrual is delayed until *non-parties*, including the government, present plaintiffs with expert proof of causation, also flies in the face of policy and precedent. Plaintiffs may not "sit idly by and wait for...the federal government [or other official agencies] to prove their claims. They must do that themselves." *Carey v. Kerr-McGee Chem. Corp.*, 999 F. Supp. 1109, 1116 (N.D. Ill. 1998). For this additional reason the Second Circuit's decision cannot be reconciled with *Kubrick* and its progeny.[5] There is no basis for the Second Circuit's ruling that action or inaction *by a non-party* tolls accrual of a plaintiff's claim. This, in essence, penalizes the defendants for acts or omissions of non-parties. Again, the Second Circuit cites no authority for this novel and expansive position.

### C. Circuits That Embrace An Expansive Discovery Rule Delay Accrual Indefinitely, In Essence Preventing Summary Disposition Of Claims On Statute Of Limitations Grounds.

The circuits, including the Second Circuit, that have expanded the accrual rule have in effect established a new and entirely different accrual standard. To hold that a question of

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[5] *See, e.g.*, *Kubrick*, 444 U.S. at 124 (may not rely on reassurances by Veterans Administration); *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (Department of Justice letters suggesting lack of claim did not toll accrual); *Gnazzo v. G.D. Searle & Co.*, 973 F.2d 136, 138 (2d Cir. 1992) (accrual is not delayed until expert opines on a causal connection); *Kansas Pub. Employees Retirement Sys. v. Blackwell*, 114 F.3d 679, 690-91 (8th Cir. 1997), *cert. denied*, 522 U.S. 1068 (1998) (Attorney General's report did not toll accrual); *Doe v. American National Red Cross*, 923 F. Supp. 753, 760 n.11 (D. Md. 1996) (government investigation did not toll accrual).

fact exists as to accrual in a "diligence-discovery" setting if there is "some" information negating causation and absent an expert opinion as to causation results in the exception becoming the rule. Such an outcome-oriented approach departs with well-established law and results in a strange dichotomy. Causation will be hotly contested and the subject of substantial debate in all but the rarest of cases. To suggest that plaintiffs' claims do not accrue until this debate is resolved will postpone accrual indefinitely.

Indeed, the Second Circuit suggests that one must have definitive proof of causation or at least have eliminated all information questioning causation before a claim accrues as a matter of law. *See, e.g.*, the Second Circuit's emphasis on "knowledge" of "cause" (Pet. App. A at 54a – must have "knowledge" or it is not sufficient as a matter of law to establish "reasonably should have *known*.").[6] "Actual knowledge" or proof of causation, however, is not required for accrual in latent exposure cases. *See, e.g., Fidler*, 714 F.2d at 199 (once on notice of a potential claim, plaintiffs' cause of action "is no longer inherently unknowable"); *Tolston*, 102 F.3d at 866 (plaintiffs come close to "suggesting that only actual knowledge of cause is enough to make the claim 'accrue' – a proposition we squarely reject[]"). Information questioning causation is not now, nor has it ever been, a rationale or excuse for postponing accrual.

A claim may accrue as a matter of law under the "knows or reasonably should have known" standard if evidence exists

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[6] In so holding, the Second Circuit departs from its prior rulings on accrual. *See, e.g., Kronisch*, 150 F.3d at 121-22 ("[P]laintiff need not have compelling proof of the validity of his claim in order for his claim to accrue – indeed, in cases where plaintiff's claim is ultimately misconceived, such proof will not exist ..."); *see also Gnazzo*, 973 F.2d at 138.

challenging causation. To hold otherwise, as the Second Circuit has, creates the ironic situation that a plaintiff with a meritorious claim, i.e., no information negating causation, gets *an earlier accrual date* than a person with a meritless claim. Surely this cannot be the law. *See, e.g., Fidler*, 714 F.2d at 200 ("The plaintiff's failure to marshal support despite diligence may mean, however, that he has received poor medical, scientific or legal advice. That result is unfortunate but is also no reason why the statute should not run.").

Consideration of exculpatory factors in the accrual analysis undermines the basic and well-established policies and principles underlying the discovery rule in significant respects. Under the FRCD, once a plaintiff is aware of the injury and its potential cause, his claim accrues. If subjective factors or excuses are a valid part of the accrual analysis, statutes of limitations are rendered meaningless, any bright line rule is erased, and parties are left to *ad hoc* justice. Such an unwarranted expansion of the discovery rule should be rejected and the proper standard (as articulated by the district court) reinstated. By the end of 1991 (at the latest) sufficient information was available such that plaintiffs reasonably should have been on notice of a possible claim based on their cancers. Pet. App. C at 178a. Plaintiffs' actions commenced in or after 1995 are time-barred.

### D. Plaintiffs Who Fail Diligently To Inquire Should Not Receive The Benefit Of An Expanded Discovery Rule.

The Second Circuit's relaxation of the "diligent inquiry" requirement further departs from well-established precedent. Accrual is only postponed until plaintiff has or *with reasonable diligence* should have discovered the critical facts of both his injury and its cause. *See Urie*, 337 U.S. at 170; *Kubrick*, 444 U.S. at 122-24. A plaintiff who remains ignorant through lack of diligence cannot be characterized as

blameless and cannot rely on "blameless ignorance" as a rationale for delaying accrual. *Id.*

Plaintiffs admit they made *no inquiry at all* as to the potential cause of their injuries and that they were not aware of the information they now claim lulled them into delaying suit. Thus, plaintiffs here should be estopped from raising mitigating factors such as availability of information questioning causation. *Cf. Klehr*, 521 U.S. at 194 ("'reasonable diligence' does matter and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment' to toll the statute of limitations"); *accord Grimmett v. Brown*, 75 F.3d 506, 514 (9th Cir.), *cert. denied*, 518 U.S. 1003 (1996) (plaintiff must plead with particularity the circumstances warranting tolling and state facts showing his due diligence).

**E. Certiorari Is Warranted Now Because: 1) Accrual Plays A Pivotal Role In Latent Injury Claims And 2) Disparate Application Of The Discovery Rule Will Result In Further Erosion Of The Rule.**

The Second Circuit decision has ramifications far beyond the FRCD and the disposal of plaintiffs' claims. The statute of limitations, one of the oldest and central features of American common law, is a "meritorious defense, in itself serving a public interest." *Kubrick*, 444 U.S. at 117. Limitations periods represent the state's choice to provide repose for stale claims, and the marking of accrual is essential to this jurisprudence. Under any relevant standard, whether based on the allegedly wrongful act, date of diagnosis of the injury, or discovery of cause, courts recognize that the bright line objective test is required. To indefinitely delay accrual, in some instances decades after death or diagnosis, leaves the claims open to the vagaries of ever-changing science thus thwarting the purpose of repose statutes. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (delay is the "bane" of the search for

truth and thus should not be encouraged or rewarded); *Rotella*, 528 U.S. at 559 (expansion of the discovery rule would "bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability").

The split among the circuits also results in considerable disarray as to when a claim accrues under a diligent discovery rule of accrual. Latent injury claims alleging environmental or products exposure occupy an increasing share of civil litigation. If different applications of the rule are permitted, the same claim (factually) will accrue at different times in different circuits. This is precisely the situation that warrants review by this Court.

Only this Court can resolve the problems created by the Second Circuit decision and bring clarity to this important area of the law.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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